

Letter of Findings Number: 07-0302
Sales Tax
For Tax Years 2004-05

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ISSUES

I. Sales Tax—Recreational Vehicles.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-5; IC § 6-2.5-5-39; IC § 6-2.5-13-1; IC § 6-8.1-5-1; Commissioner's Directive 25 (July 2004).

Taxpayer protests the imposition of sales tax.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

The Department addresses the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a retailer of recreational vehicles with one business location in Indiana, one business location in another state and one business location in a third state. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for sales tax and for use tax for the tax years 2004 and 2005, along with negligence penalties and interest. Taxpayer protests the sales tax assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Recreational Vehicles.

DISCUSSION

Taxpayer protests the imposition of sales tax on its sales of recreational vehicles to out-of-state customers in the years 2004 and 2005. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). The audit report states that many of the recreational vehicles in question were delivered to Taxpayer's customers in a city across the state line a short distance from Taxpayer's Indiana business location. The documentation supplied by Taxpayer as part of this protest supports this position. The remainder of the recreational vehicles upon which the Department imposed sales tax were delivered to out of state destinations.

The Department imposed sales tax on thirty-three sales Taxpayer made to non-Indiana residents between July 1, 2004, and June 30, 2005, when Taxpayer did not collect Indiana sales tax and could not establish that the customer paid sales tax in their home state. One sale on December 22, 2005, was also deemed as subject to Indiana sales tax. The Department gave credit against the Indiana sales tax for the amount of sales or use tax any customer paid in the home state. Taxpayer protests that it was not required to collect Indiana sales tax in these cases, and has provided purchase orders and delivery verification statements from several of its out-of-state customers supporting its position that the vehicles were delivered outside Indiana's borders.

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. *The retail merchant shall collect the tax as agent for the state.* (Emphasis added.)

Prior to July 1, 2004, Indiana had an exemption for the sale of motor vehicles which were to be immediately transported to a destination outside of Indiana. The statute providing this exemption, IC § 6-2.5-5-15, was repealed as of July 1, 2004. Also on July 1, 2004, sales tax exemption certificate ST-137 was eliminated and was no longer an effective document for claiming an exemption from sales tax for out of state purchasers of motor vehicles to be titled or registered outside of Indiana, as explained by Commissioner's Directive 25 (July 2004). Commissioner's Directive 25 (2004) also explains in relevant part:

The repeal of [IC 6-2.5-5-15](#) only affects situations where the purchaser takes possession of the vehicle prior to taking the vehicle out of state.

This repeal does not affect out of state sales by Indiana dealers. For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. *However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.*

(Emphasis added.)

The Department allowed a credit against Indiana sales tax for sales or use tax paid to other states, as

provided by IC § 6-2.5-3-5.

Taxpayer refers to IC § 6-2.5-13-1(d)(2) in support of its position that the sales of recreational vehicles are not sourced to Indiana. As in effect during 2004 and 2005, IC § 6-2.5-13-1 stated in relevant part:

(a) As used in this section, the terms "receive" and "receipt" mean:

- (1) taking possession of tangible personal property;
- (2) making first use of services; or
- (3) taking possession or making first use of digital goods;

whichever comes first. The terms "receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser.

(b) This section:

- (1) applies regardless of the characterization of a product as tangible personal property, a digital good, or a service;
- (2) applies only to the determination of a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's retail sale of a product; and
- (3) does not affect the obligation of a purchaser or lessee to remit tax on the use of the product to the taxing jurisdictions of that use.

(c) *This section does not apply to sales or use taxes levied on the following:*

(1) The retail sale or transfer of watercraft, modular homes, manufactured homes, or mobile homes. These items must be sourced according to the requirements of this article.

(2) *The retail sale, excluding lease or rental, of motor vehicles, trailers, semitrailers, or aircraft that do not qualify as transportation equipment, as defined in subsection (g). The retail sale of these items shall be sourced according to the requirements of this article, and the lease or rental of these items must be sourced according to subsection (f).*

(3) Telecommunications services, as set forth in [IC 6-2.5-12](#), shall be sourced in accordance with [IC 6-2.5-12](#).

(d) The retail sale, excluding lease or rental, of a product shall be sourced as follows:

(1) When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.

(2) *When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller.*

(3) When subdivisions (1) and (2) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.

(4) When subdivisions (1), (2), and (3) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.

(5) When none of the previous rules of subdivision (1), (2), (3), or (4) apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).

...

(g) The retail sale, including lease or rental, of transportation equipment shall be sourced the same as a retail sale in accordance with the provisions of subsection (d), notwithstanding the exclusion of lease or rental in subsection (d). As used in this subsection, "transportation equipment" means any of the following:

(1) Locomotives and railcars that are used for the carriage of persons or property in interstate commerce.

(2) Trucks and truck-tractors with a gross vehicle weight rating (GVWR) of ten thousand one (10,001) pounds or greater, trailers, semitrailers, or passenger buses that are:

(A) registered through the International Registration Plan; and

(B) operated under authority of a carrier authorized and certificated by the U.S. Department of Transportation or another federal authority to engage in the carriage of persons or property in interstate commerce.

(3) Aircraft that are operated by air carriers authorized and certificated by the U.S. Department of Transportation or another federal or a foreign authority to engage in the carriage of persons or property in interstate or foreign commerce.

(4) Containers designed for use on and component parts attached or secured on the items set forth in subdivisions (1) through (3).

....
(*Emphasis added.*)

The recreational vehicles in question do not qualify as transportation equipment as defined by IC § 6-2.5-13-1(g), therefore they are not sourced under the provisions of IC § 6-2.5-13-1, as explained by IC § 6-2.5-13-1(c)(2). The documentation provided by Taxpayer and Taxpayer's customers only states "out-of-state delivery" or a city in another state. This documentation does not have a specific location. Since there is no specific location on this documentation, and since Commissioner's Directive 25 (July 2004) states that a specific location is required, this documentation does not support Taxpayer's position.

Taxpayer also refers to a revenue ruling in which the Department ruled that the delivery of furniture to an out-of-state location was not subject to Indiana sales or use tax. As previously explained, under IC § 6-2.5-13-1(c)(2) the sale of recreational vehicles is sourced differently than the sale of other tangible personal property. Taxpayer's reference to this revenue ruling is not relevant.

Taxpayer further protests that the audit report states that neither Indiana sales tax nor sales tax for the state where delivery occurred was charged, and that the sales tax statutes and regulations of the other state do not require collection of sales tax since the final destination of the recreational vehicles was outside that state. A review of the audit report shows that the analysis of this situation follows the primary explanation that the repeal of IC § 6-2.5-5-15 requires the collection of Indiana sales tax on the sale of the vehicles in question. Whether or not sales tax from the state where Taxpayer delivered the vehicles to the customers was collected is not in and of itself relevant. The relevant factor is whether any state sales or use tax was collected where the customers registered or titled the recreational vehicles. The Department did give credit for sales or use taxes paid in any state by the customer, in accordance with IC § 6-2.5-3-5.

The Department also imposed sales tax on the sale of one recreational vehicle which took place on December 22, 2005. Beginning on July 1, 2005, an exemption from sales tax on the sale of recreational vehicles was provided by IC § 6-2.5-5-39, which states:

(a) As used in this section, "cargo trailer" means a vehicle:

- (1) without motive power;
- (2) designed for carrying property;
- (3) designed for being drawn by a motor vehicle; and
- (4) having a gross vehicle weight rating of at least two thousand two hundred (2,200) pounds.

(b) As used in this section, "recreational vehicle" means a vehicle with or without motive power equipped exclusively for living quarters for persons traveling upon the highways. The term includes a travel trailer, a motor home, a truck camper with a floor and facilities enabling it to be used as a dwelling, and a fifth wheel trailer.

(c) A transaction involving a cargo trailer or a recreational vehicle is exempt from the state gross retail tax if:

- (1) the purchaser is a nonresident;
- (2) upon receiving delivery of the cargo trailer or recreational vehicle, the person transports it within thirty (30) days to a destination outside Indiana;
- (3) the cargo trailer or recreational vehicle will be titled or registered for use in another state or country;
- (4) the cargo trailer or recreational vehicle will not be titled or registered for use in Indiana; and
- (5) the cargo trailer or recreational vehicle will be titled or registered in a state or country that provides an exemption from sales, use, or similar taxes imposed on a cargo trailer or recreational vehicle that is purchased in that state or country by an Indiana resident and will be titled or registered in Indiana.

A transaction involving a cargo trailer or recreational vehicle that does not meet the requirements of subdivision (5) is not exempt from the state gross retail tax.

(d) A purchaser must claim an exemption under this section by submitting to the retail merchant an affidavit stating the purchaser's intent to:

- (1) transport the cargo trailer or recreational vehicle to a destination outside Indiana within thirty (30) days after delivery; and
- (2) title or register the cargo trailer or recreational vehicle for use in another state or country.

The department shall prescribe the form of the affidavit, which must include an affirmation by the purchaser under the penalties for perjury that the information contained in the affidavit is true. The affidavit must identify the state or country in which the cargo trailer or recreational vehicle will be titled or registered.

(e) The department shall provide the information necessary to determine a purchaser's eligibility for an exemption claimed under this section to retail merchants in the business of selling cargo trailers or recreational vehicles.

The Department imposed sales tax on this sale because the customer showed that it had paid only a county-level tax, not a state sales tax. IC § 6-2.5-5-39(c)(5) explains that the cargo trailer or recreational vehicle will be titled or registered in a state or country that provides an exemption from sales, use, or similar taxes imposed on a cargo trailer or recreational vehicle that is purchased in that state or country by an Indiana resident and will be titled or registered in Indiana, and that a transaction involving a recreational vehicle that does not meet the requirements of subdivision (5) is not exempt from the state gross retail tax. For this sale, the purchaser did

not verify that it paid sales or use tax similar to that which would be required to be paid if the purchaser had registered or titled the vehicle in Indiana. Therefore, this sale did not qualify for the exemption provided by IC § 6-2.5-5-39.

In conclusion, the documentation provided by Taxpayer and its customers do not state the required specific locations for delivery, as explained by Commissioner's Directive 25 (July 2004.) The Department's reference to the absence of sales tax for the state where the vehicles were delivered was not the foundation of the Department's proposed assessments, but was merely explanatory, and the taxable status in that state is not relevant. The taxable status in the state where the purchaser registered or titled the recreational vehicle is relevant. Therefore, this documentation is not sufficient for Taxpayer to overcome the burden of proving the proposed assessments wrong, as provided by IC § 6-8.1-5-1(c). The sale on December 22, 2005, did not have verification that the customer met the requirements of IC § 6-2.5-5-39(c)(5). The Department properly imposed Indiana sales tax which Taxpayer was required to collect on these sales, and properly gave credit for sales or use taxes paid in other states.

FINDING

Taxpayer's protest is denied.

II. Tax Administration–Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax year in question. In light of the rapid statutory changes in this area for the years at issue, the imposition of penalty will be addressed. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#).

FINDING

The negligence penalty will be waived.

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